IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 21 OF 2006

Sanjay Kumar Thakur
presently lodged in
Central Jail, Aguada,
Sinquerim, Bardez, Goa. .... Appellant

V/s.

State of Goa,
as represented by Officer-In-Charge,
Anti Narcotic Cell P.S.,
Panaji-Goa. .... Respondent

Mr. J.P. D'Souza, Advocate for the Appellant.
Mr. C.A. Ferreira, Public Prosecutor for the Respondent.

CORAM : N.A. BRITTO, J.

DATE : 20th /29th SEPTEMBER, 2007

ORAL JUDGMENT :

This appeal is by the accused who has been convicted and sentenced under Section 20(b)(ii)(A) and (C) of the NDPS Act, 1985 for having been found in possession of 1.180 gms. of charas by judgment dated 23/01/2006 of the learned Special Judge, NDPS Court, Mapusa.

2. The raid was conducted by Police Inspector Uday Naik of ANC police station, Panaji on the basis of prior information. In support of the charge, which was separately framed, on the allegation that 80 gms. of charas were

found on the person of the accused and 1.1 kgs of charas were found in the bushes, prosecution had examined eight witnesses including Smt. Sulas Raut/PW8 near whose house the accused is stated to have been apprehended.

3. As per the said Uday Naik/PW7, he was attached to the said police station on 12/12/2002 when at about 19.45 hrs. he received reliable information that a 20 year old person of stated description was selling charas behind the house of the said Smt. Sulas Raut near Colander juice parlour and restaurant at Dabolwado, Chapora between 9.30 p.m. and 10.00 p.m. and was likely to leave for his native place and therefore he reduced the said information in writing and submitted a copy of the same to Dy. S. P. D'Souza/PW5 for his information personally, and after taking instructions from him to conduct the raid, at about 8.20 p.m. he deputed Constable Vaz/PW6 to bring two panchas directly at the spot of the raid at Dabolwado, Chapora and at about 8.25 p.m., he left the police station along with Police Inspector Shri Paes/PW4, Dy. S. P. D'Souza/PW5 and others in two police jeeps and one private motorcycle, along with the seal of ANC police station and other sealing material, etc., and reached there at about 8.55 p.m. and thereafter parked their vehicles and concealed themselves. He stated that at about 9.15 p.m. Constable Vaz/PW6 came to the spot with two panch witnesses namely Mandrekar/PW3 and Surlakar/CW1 to whom he told about the receipt of the information and introduced the panch witnesses to the

members of the raiding party and thereafter at about 9.50 p.m. he pointed out to one person to the raiding party who was near the house of the said Smt. Sulas Raut/PW8 and whose description tallied with the information received earlier and who was seen removing something from the bushes and putting it in the right hand side pant pocket and also for searching something in the bushes. As per him, the accused was looking suspiciously in the surrounding area and thereafter all of them rushed towards the accused and surrounded him, and, he identified himself and asked the accused for his name which he gave as Sanjay Kumar Thakur, native of Kullu, H.P. and then staying at Chapora. He stated that he introduced the panchas and the raiding party members to the accused and told him that he had the right to be searched in the presence of a Gazetted Officer or a Magistrate of his choice but he declined the offer and also told the accused that he had a right to search the raiding party and the panchas, which offer the accused also declined. According to him, he then started with the personal search of the accused who was wearing a dark blue colour shirt and blue colour jeans pant. In the course of the search, he found one autopress polythene bag in his right pant pocket which contained blackish colour substance and upon minute observation and smelling he suspected it to be charas and this substance weighed 80 gms. which was then packed and sealed with seven seals. According to him, he then conducted the search of the bushes and found one transparent polythene bag and upon opening the same he found that it contained 5 autopress

transparent polythene bags also containing blackish colour substances in different sizes and shapes and upon minute observation and smelling he suspected the said substance to be charas which he also put in an envelope, packed and sealed and thereafter informed the accused that the possession of the charas was an offence and asked the accused whether he had any documents to produce but the accused produced none. Uday Naik/PW7 then stated that the panchanama which began at about 10 p.m. was completed at about 2 a.m. of the next day and was signed by him, by both the panchas and the accused. He also stated that he prepared a letter, addressed to Dy. S. P. Shri D'Souza/PW5 of handing over the seal at the spot but the said letter was handed over at the police station after putting the outward number. He stated that he handed over the seized articles along with the letter to Vincy Paes/PW4 at the police station after return at about 4 a.m. and then lodged and registered a complaint against the accused and submitted intimation under Section 57 of the Act to Dy. S. P. D'Souza/PW5.

4. Uday Naik/PW7 stated that the relevant entries on the muddemal register were made by Vincy Paes/PW4 and the latter in his evidence stated that he had received the muddemal property in two sealed envelopes to be forwarded to the laboratory and further stated that on the same day, the two sealed envelopes were sent to the office of CID, CB, Panaji with one LHC buckle no. 3250 and the forwarding letter addressed to the Director of Foods

and Drugs Administration along with a covering letter addressed to the Senior Superintendent of Police, Crime Branch, Panaji.

5. Sushant Naik/PW2, the Scientific Assistant, confirmed having received the letter addressed to SP, CID as well as the letter addressed to the Director of Foods and Drugs Administration, through Lady Head Constable buckle no. 3250 of ANC police station. He also confirmed having delivered the said two sealed envelopes along with the forwarding note and the forwarding letter to the Directorate of Foods and Drugs Administration, Panaji. At the said Directorate, the contents of the said two envelopes were analysed by Kaissare/PW1, the Junior Scientific Officer, who found after carrying out several tests that contents of both the envelopes/parcels were positive for charas.

6. The learned Special Judge, after considering the evidence produced by the prosecution came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The learned Special Judge rejected the contention of the defence that the panchas were not present. The learned Special Judge also noted that Surlakar/CW1 was not examined for the obvious reason that he had acted as a panch witness in a dozen of cases at the instance of the said ANC police station and whose testimony would have been brought under cloud as that of a stock witness. In other words, the learned

Special Judge did find that Surlakar/CW1 who was not examined, was a stock panch witness. As regards Santosh/PW3 the learned Special Judge found that he was taken to the spot to act as pancha but the fact that he acted as a panch witness in about eight cases was of no consequence. The learned Special Judge concluded that the case should not suffer for the lapse on the part of Uday Naik/PW7 for taking the same witnesses with consistency or frequency, as otherwise there was material to establish its case against the accused.

7. At the time of hearing of this appeal, learned Counsel on behalf of the accused, has submitted that the raid was conducted without the presence of independent witnesses. The presence of two witnesses namely Vijay Surlakar/CW1 and Santosh Mandrekar/PW3 is a matter of doubt. Learned Counsel has submitted that prosecution evidence shows that the said two witnesses namely Santosh Mandrekar/PW3 and Vijay Surlakar/CW1 were pliable witnesses in the hands of ANC police station and therefore no reliance could be placed on their evidence. In other words learned Counsel contends that the said two witnesses are not only not independent witnesses but their very presence during the time of the panchanama is doubtful and that being the case, the entire story otherwise given by the police witnesses cannot be accepted. Learned Counsel submits that there is no consistency in the evidence of other witnesses as to where exactly the accused was apprehended. Learned Counsel further submits that the presence of Surlakar/CW1 is a

matter of mystery as one does not know who had contacted him, for him to have reached at the scene of offence for the panchanama and in case Surlakar was not present, what follows therefrom is that the other witnesses are lying as well. It is also contended on behalf of the accused that the presence of Constable Vaz/PW6 who is said to have been sent to get the said two panch witnesses namely Santosh Mandrekar/PW3 and Surlakar/CW1 is also a matter of doubt as he could not have left the police station at 8 p.m. in the search of panchas when it is the very case of Uday Naik/PW7 that he was sent at 8.20 p.m. It is also contended that in case Constable Vaz/PW6 was present at the scene, he having been a member of the raiding party, he would not have gone and sat in the police jeep, and in this version of his, no one else has supported him including Uday Naik/PW7.

8. On the other hand, the learned Public Prosecutor, appearing on behalf of the Respondent, has not been able to provide any answer much less a satisfactory answer as to how Surlakar/CW1 had reached the scene of panchanama when otherwise it was the case of Uday Naik/PW7 that both the panchas were brought by Constable Terrence Vaz/PW6 but the latter's case was that he had only met Santosh Mandrekar/PW3 and taken him there and that there was no direct communication between him and the said Surlakar.

Date : 29/09/2007

9. In my view, there are too many gaping holes or tears which cannot be stitched together in the case of the prosecution to have accepted the same as free from doubt and that is because of manipulations. The evidence read as a whole cannot at all be reconciled on major aspects of the case though the conclusion arrived at by the learned Special Judge is otherwise.

10. The first aspect which needs consideration is as regards the place from which the accused was apprehended. According to the accused, he was picked up from the room occupied by him of Smt. Sulas Raut/PW8. That he was occupying one of the rooms of Smt. Sulas Raut has been confirmed by her. Why does a police officer, if he received information at 19.45 hrs. that someone is selling charas, behind someone's house, wait till 9.00 p.m. or so to raid such person? That would be the first question to be asked. Uday Naik/PW7 has given rather a vague description of the place from where the accused was apprehended. According to him, the accused was near the house of the said Smt. Sulas Raut/PW8. Was the accused seen at the back of the house or in front of it? Uday Naik/PW7 has chosen to remain vague. In case he was waiting for the arrival of the accused, it was certainly expected of him to have seen the accused coming from some direction or the other. According to the panch witness Santosh Mandrekar/PW3 the accused was on the road by

the side of the house and searching for something and this was the answer given by the witness to the question asked of him as to where was the accused. According to Mandrekar/PW3, the accused was on the right side of the house as one faces the house from the main road and was at a distance of about 8 mts. from the said house. It is come on record that the house of Smt. Sulas Raut/PW8 has a compound wall to which Mandrekar/PW3 makes no mention. However, according to Vincy Paes/PW4, the accused was on the kacha road on the left hand side of the said house beyond which there were bushes. Finton D'Souza/PW5 like Uday Naik/PW7 has not described the place where exactly the accused was apprehended in relation to the house of the said Smt. Sulas Raut and if at all Mandrekar/PW3 saw the accused on the right hand side, it is obviously because he was not present. If there are two versions as to where the accused was found, there is also a third which is recorded on Exhibit 49 and that is that the accused was selling charas behind the house of Smt. Sulas Raut/PW8. Moreover, the manner in which the information Exhibit 49 is recorded shows that it was not recorded at 19.45 hrs. as claimed to be. If the information was that the accused was selling charas behind the house, Uday Naik/PW7 ought to have gone and apprehended him immediately. The information was certainly not that the accused would be selling charas behind the house between 9.30 and 10.00 p.m. The prosecution has not come out with the clear case as to in what manner the accused came to be apprehended and from which place. If the accused had found something

and had already put it in his pocket, it is again difficult to accept the story that the accused was searching for something in the bushes. Moreover, the charas weighing 1.1 kgs were not found in possession of the accused but by search in the bushes by Uday Naik/PW7 and if that is so, the accused could not be attributed with the possession of the same.

11. The next aspect to be considered is whether both the pancha witnesses were at all present during the time of the raid. There is serious doubt whether they were at all present. As per list provided this was the seventh case where Surlakar/CW1 had acted as a pancha. Paes/PW4 has admitted that Surlakar/CW1 had acted as a pancha witness in fifteen cases where he was a member of the raiding party.

12. As per Uday Naik/PW7 and D'Souza/PW5, Constable Terrence Vaz/PW6 was sent at 8.20 hrs. to bring two panchas directly to the spot at Dabolwado and he came there at about 9.15 p.m. with Mandrekar/PW3 and Surlakar/CW1. The same is the version given by Uday Naik/PW7 in his complaint-Exhibit 68. Uday Naik/PW7 has admitted that normally panchas are taken from the police station but there has been no explanation from him for the departure from that normal rule in this case or as to what he would have done in case Vaz/PW6 had not to reach by 9.30 p.m. On 14/07/2004 Paes/PW4 made a statement that Constable Vaz/PW6 came to the spot with

panchas Mandrekar/PW3 while Surlakar/CW1 came on a motorcycle directly to the spot. On 1/09/2004 the examination of D'Souza/PW5 was adjourned as the learned Public Prosecutor wanted a clarification on the statement of Constable Vaz whose statement was otherwise not recorded by Uday Naik/PW7. On 30/10/2004 Constable Vaz/PW6 made a statement that he had secured only Mandrekar/PW3 and when he went to the spot Vijay Surlakar/CW1 was already present . On 20/01/2005 Paes/PW4 changed his statement and stated that he had not specifically stated that Surlakar/CW1 came on the motorcycle directly to the spot of the raid and further stated that Surlakar/CW1 came after Vaz/PW6 but almost simultaneously. Admittedly, Vaz/PW6 had personally not contacted Surlakar/CW1 to tell him to come to a particular place. It is not the case of Uday Naik/PW7 or any other officer that they had contacted him and called him to the spot of the raid. Three different conflicting versions regarding his presence at the said place raise a serious doubt whether he was at all present. He must have signed the panchanama subsequently to oblige the police as he is their regular stock witness. The said Surlakar was also a panch witness in the case of ***B. Chandramohan*** appeal from which was decided by this Court on 24/03/2006 in ***Criminal Appeal No. 53 of 2004*** and again in the case of ***Ron Chayak V/s. State of Goa (2007 (4) AIR BOM R 224)*** decided by this Court on 2nd /9th March, 2007 and in the context of the case of ***B. Chandramohan*** this Court had observed that the said Surlakar had stood as a panch witness prior to the raid in that case i.e. on

29/01/2002 and was thereafter on fifteen occasions, which fact was admitted by D'Souza/PW5. In that case D'Souza/PW5 had also stated that he was present during most of the raids where Surlakar/PW3 was a panch witness and this Court had observed that it was not understood as to what sort of Superior Officer Dy. S. P. D'Souza/PW5 was so as to not have advised PI Paes/PW4 (who was the IO in that case) that he should desist from engaging a panch witness in so many cases and this inspite of the Government having given instructions to call on Government servants to act as panchas.

13. The case of Mandrekar/PW3 is not different. Mandrekar/PW3 was examined before the Court for the first time on 10/12/2003 and again on 23/03/2004. On this day he admitted that he stood as a panch witness in four to five cases and further stated that he had not appeared in any other cases. As per the list provided by the Police Inspector of ANC police station–Exhibit 79 this was the fifth case where Mandrekar/PW3 had stood as a panch witness for ANC police station and by the time his evidence was recorded on 23/03/2004 Mandrekar/PW3 had stood as the panch witness in ten cases. In other words on 23/03/2004, Mandrekar/PW3 had suppressed the fact that he had stood as a panch witness in ten cases. As per Exhibit 79 both of them namely Vijay Surlakar/CW1 and Santosh Mandrekar/PW3 had stood as a common panch witness for the first time in this case and subsequently twice but nevertheless it was admitted by Mandrekar/PW3 that he had stood as a

panch witness in another case prior to this case, along with the said Vijay Surlakar/CW1. Therefore the statement of Mandrekar/PW3 that he was introduced to Surlakar/CW1 for the first time has got to be considered as a false statement. This witness had stood as a panch witness on 29/12/2002 along with the said Vijay Surlakar in the case of ***Yallapa Chalwadi*** which was the subject matter of ***Criminal Appeal No. 56 of 2004*** decided by this Court on 4/08/2006. In that case the learned Special Judge had expressed a doubt about his presence and had stated that the evidence of Mandrekar/PW3 could not be reconciled with the evidence of Paes/PW4 (in that case as well). In acquitting the accused, this Court had, inter alia, noted that there were inconsistencies between the evidence of Santosh Mandrekar/PW3 and Uday Naik (PW4 in that case) and the said inconsistencies pointed out in one direction namely that Santosh Mandrekar/PW3 was not present when the alleged seizure took place and he had deposed to support the case of prosecution because he was a regular panch witness. This Court had stated that his evidence had to be rejected as that of a witness whose presence was doubtful.

14. As per the version given by him, he has a shop near the Education Department which in his absence is being managed by his wife Mrs. Mandrekar. According to him on that day as he had some urgent work he left the shop at around 7.30 p.m. to go home to Mandrem from where he travels

everyday to Panaji. According to him the last bus to Mandrem from Panaji leaves at about 8.30 to 8.45 p.m. and he was supposed to catch the bus going home at 8.30 p.m. but before he reached the bus stand near Ambedkar garden he met Constable Vaz/PW6. He stated that he knew the said Constable earlier since he was called to act as a pancha in a case relating to Israeli National by name Yaniv Cohen and thereafter the said Constable took him on his motorcycle to the spot at Chapora where he met Uday Naik/PW7 and where he was introduced to the second panch Surlakar to whom he was introduced for the first time and that the raiding party and the said Surlakar were already there when he was taken by Constable Vaz. In case Mandrekar/PW3 had left early to go home, it is difficult to believe that he was still at Panaji, near Ambedkar Park, to be met by Vaz/PW6. According to Mandrekar/PW3 he was sent home by arranging a taxi at 4.00 a.m. on the next date but according to Vaz/PW6 and Paes/PW4 Mandrekar/PW3 returned to the Police Station in the police jeep. These glaring contradictions make his presence doubtful.

15. Constable Vaz was shown as a member of the raiding party but his statement was not recorded, though the statements of the other persons of the raiding party were recorded. That he was a member of the raiding party is recorded in the very complaint–Exhibit 68 and so also in the Search Panchnama - Exhibit 29. On 1/09/2004 the examination of D'Souza/PW5 was adjourned at the request of the Public Prosecutor since he wanted to seek a

clarification as regards the statement of said Terrence Vaz and on 22/12/2004 D'Souza/PW5 made a categorical statement that Constable Vaz was not a member of the raiding party but was only deputed to secure the panchas and brought pancha Mandrekar/PW3 directly to the spot. On 30/10/2004 Constable Vaz/PW6 stated that after introducing Mandrekar/PW3 to PI Naik he left the spot of raid to secure mineral water and when he returned back none were present so he waited in the jeep and only after some length of time, that is to say after about three hours he saw that PI Naik and all raiding party members coming towards the jeep along with the accused. This is an explanation given by him which is not at all supported by Uday Naik/PW7 and if the explanation given by him and D'Souza/PW5 was correct, he would not been shown as a member of the raiding party in the panchanama and in the complaint. It appears that Constable Vaz/PW6 was examined subsequently and that too without recording his statement only to justify the presence of the panch witnesses at the scene and in this the prosecution has failed miserably.

16. On behalf of the Respondent, Shri Ferreira has placed reliance on the case of ***Mohammed Salim Mohammed Issak Shaikh V/s. State of Maharashtra (2001 Drugs Cases 255)*** wherein the public panch witness had fairly admitted in his cross-examination that he had stood as such in seven cases but that happened to be of different police stations and in that context

the Division Bench of this Court observed that the circumstance that the public panch witness is a habitual panch witness would certainly weigh with the Court if it finds that the evidence of police witnesses is not free from blemish and in that situation the circumstance that the public panch was a professional would certainly be an impediment in the way of the Court in confirming a conviction in a case under the NDPS Act. This Court in the case of ***Mr. Gregoire Mounier V/s. State of Goa (2001(1) GLT 450)*** had occasion to refer to other decisions of this Court. To the case of ***Abdul Sattar V/s. State of Goa (1989 Cri.L.J. 430)*** wherein it was observed that the fact that the panch witness had stood as a panch witness in five to six cases was sufficient to show that he could not be considered to be an independent witness and could be considered as an amenable witness to the raiding party and therefore no reliance could be placed on his evidence. It was also observed that once it was accepted that the police who had raided the accused had taken the panch witnesses and when one of them was examined in Court and it was proved that he was a person amenable to a member of the raiding party, it would not lie in the mouth of the prosecution to contend that the evidence of such a witness be discarded and the evidence of the police officer only be relied upon. The case of ***Mohammed Hussain B. Ramzan V/s. State of Maharashtra (1994 B.Cr.C. 223 (Bom.))*** was also referred to wherein it was observed that normally it is expected that the Investigating Officer will take independent panch witnesses and if knowingly he has taken pliable witnesses

as panch witnesses the entire raid would become suspect and in such a case it would not be possible to hold that the evidence of police witnesses by themselves would be sufficient to base a conviction. The case of ***Shri Bhagwatsingh Gaud V/s. State of Goa (1998 All MR (Cri) 1421)*** was also referred to wherein it was observed that once the witness is held to be a stock witness who could be termed as a pliable witness, it casts serious doubt and creates serious suspicion about the entire raid operation and the minimum care expected of a search officer of PI level is that he takes independent panch witnesses to witness the search and seizure transaction and if such officer does not act with reasonable prudence, the entire search and seizure operation may become doubtful. In the case of ***Ron Chayak*** (supra) reference was made to ***State of Gujarat V/s. Kumuchandra Pranjivan Shah (1997 SCC (Cri) 750)*** wherein the Apex Court observed thus:

> "On appeal preferred by the respondent before the High Court of Gujarat, the Division Bench of the Gujarat High Court, inter alia, came to the finding that the panch witness though initially tried to give a picture before the Court that he had not acted as a panch witness, it was established by cogent evidence that he had acted in a number of cases as a panch witness and there were good reasons to believe that he was a pliable witness not worthy of evidence. So far as the police witness is concerned, the High Court has also held indicating that the police officer initially did not speak out the truth and tried to suppress that the said panch

> witness had acted as panch witness in earlier cases. Considering the aforesaid fact the High Court was of the view that the said witnesses did not appear to be reliable and reliance should not be placed on their deposition. Accordingly, the High Court was of the view that the prosecution had failed to establish the case beyond reasonable doubt and passed the aforesaid Judgment acquitting the respondent."

17. The above observations of the Apex Court are squarely applicable to Mandrekar/PW3 and Uday Naik/PW7 who initially feigned ignorance as not to know in how many cases both the pancha witnesses had stood as pancha witnesses but subsequently got exposed by production of Exhibit 79 – details of cases where both of them had stood as pancha witnesses.

18. The evidence discussed herein above cast a serious doubt as regards the presence at the time of the raid of both the pancha witnesses who were otherwise stock witnesses of ANC Police Station. The evidence of the police witnesses that the raid was conducted in the presence of the said panch witnesses therefore could not have been accepted. There were other inconsistencies as well in the evidence of the prosecution. The entire story of the prosecution was not free from doubt and the benefit of it had to go to the accused.

19. Consequently, the appeal succeeds. The impugned judgment is hereby set aside. As a result the accused shall stand acquitted under Section 20(b)(ii)(A) and (C) of the Act. The accused shall be set to liberty forthwith in case he is not required in any other case. M.O.s to be disposed off as per order of the learned Special Judge.

N.A. BRITTO, J.

NH/-